United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1370

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1370

UNITED STATES OF AMERICA,

APPELLEE,

V.

DAVID LEE WHITE,

APPELLANT.

BRIEF OF APPELLANT DAVID LEE WHITE

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STATEMENT OF THE CASE

This direct criminal appeal arises from a judgment of sentence imposed July 15, 1976, after a jury trial in the District of Connecticut, Honorable Thomas F. Murphy, Senior United States District Judge for the Southern District of New York, presiding. David Lee White, the appellant, was convicted of violating 18 U.S.C. § 751(a), by escaping from the Federal Correctional Institution at Danbury. The Court imposed a sentence of two years' imprisonment. At the time of conviction in this case, the appellant had already completed serving in full the sentence of three years' imprisonment for destruction of Selective Service records for which the appellant was incarcerated at the time of the alleged escape. Timely notice of appeal was filed.

STATEMENT OF FACTS

During the evening of September 26, 1976, three prisoners left the Danbury, Connecticut, Federal Correctional Institution through a ground floor window. E.g., Tr. 22-25, 62. One of them, David Lee White, the appellant, was arrested and returned less than five days later when he freely revealed to a Frisco, Colorado, policeman that he was an escaped federal prisoner. Tr. 46-55, 80-82. The appellant took the witness stand in his own defense and testified that he had rejected proposals from the other two prisoners, Kent Frey and James Carroll, to escape with them and, indeed, had told prison authorities of the others' plans.

That the appellant had informed on the others was confirmed by the prison officials, when the government called them as witnesses. Tr. 26-29, 34-37, 63-66. The appellant said that on September 26 Frey and Carroll compelled him to escape with them by holding a knife on him, and that Frey held him captive until October 1, the day he finally eluded Frey and turned himself in to the police. Tr. 72-80.

The government introduced testimony and a copy of the appellant's judgment and commitment to show that he was a federal prisoner on September 26 and not authorized to leave the Federal Correctional Institution. Exh. 1; Tr. 7-8, 9-17. An FBI agent who interviewed the appellant on October 2, the day after his return to custody, testified that the appellant

said he escaped because he had been turned down for placement in a halfway house. Tr. 56-60. Several witnesses noted that on September 26, 1975, the appellant had only about 90 days remaining before reaching the mandatory release date on his three-year sentence. See 18 U.S.C. §§ 4163-64. Tr. 18-19, 29-30, 82-83.

To rebut the defense of coercion, the government called three witnesses. Two of these were the prisoners, Frey and Carroll, with whom the appellant left Danbury. Both (unlike the appellant) had substantial felony records, Tr. 169-70, 194; Frey's included the use of violence and a prior escape. Tr. 180-83. Each had far longer to serve on his Danbury sentence than the appellant. Tr. 183-84, 195-96. Each denied forcing the appellant to escape or to remain with them after leaving Danbury. Tr. 175-79, 193. (Carroll, who had obvious mental problems, was not questioned in any detail by either side.)

Rita Gonzalez, a former department store clerk from Minneapolis, Kansas, was also called in rebuttal, in an effort to show that during their cross-country odyssey, the appellant was not in fear of Frey. See Tr. 207 (prosecutor's argument). Mrs. Gonzalez said she had seen the appellant and Frey at the store where she worked in Kansas on September 30, 1975, when they came in together to buy shirts and socks. Tr. 160-64. She testified that the appellant was courteous and pleasant

(Tr. 162), that he laughed with his companion (Tr. 163), and that he handled the money for both of them (Tr. 164). Not only the appellant but also Frey (a government witness) denied buying clothes at any small-town store in Kansas. Tr. 104-05; 178. The defense sought to exclude the identification testimony, arguing that it was the product not of accurate recollection, but of an unnecessarily suggestive photographic display shown to Mrs. Gonzalez by an FBI agent. Tr. 120-58. The Court overruled this motion, and although Mrs. Gonzalez was the only disinterested witness to testify in rebuttal of the coercion defense, the Court also refused to give any instruction on evaluation of identification evidence. App. 10-11; Tr. 201-02 (refusing defense requests for charge nos. 6 and 7).

Judge Murphy gave only the briefest charge on the "failure to return" theory of escape and the defense of coercion, App. 16-17, 23; Tr. 228-29, 235, and no instruction at all on the complicated interplay between the two. In addition, the charge incorrectly implied that the defendant alone had an interest in testifying. App. 25; Tr. 237.

ARGUMENT

I. WHERE IDENTIFICATION TESTIMONY WAS CRUCIAL, BUT ITS RELIABILITY WAS PUT IN SERIOUS DOUBT, THE COMPLETE FAILURE TO GIVE ANY CHARGE ON EVALUATION OF IDENTIFICATION EVIDENCE CONSTITUTED REVERSIBLE ERROR.

On the central issue in the trial--whether the appellant's unauthorized departure from Danbury was voluntary or coerced--the jury was essentially faced with a credibility contest between the appellant and Frey, the fellow prisoner who was either his accomplice or his captor. The only independent, direct evidence offered to help the jury resolve this dispute was Mrs. Gonzalez's observations of the behavior of two men who bought clothes from her in a Minneapolis, Kansas, store four days after the alleged escape. From a photographic spread shown her two months later by an FBI agent, she identified the appellant as one of those men. After a motion to exclude her testimony as the product of unnecessary suggestion was denied, Mrs. Gonzalez identified the appellant and told the jury he had seemed at ease in the other man's presence and handled the money for both of them. Despite written defense requests, the Court refused to charge the jury on the dangers of misidentification inherent in eyewitness or photographic testimony. Under the circumstances of this case, this refusal was an abuse of discretion and reversible error.

A. The Unreliability of the Witness' Identification Testimony Was Dubious.

Mrs. Gonzalez apparently sold shirts and socks to a pair of men in Wallace's Department Store on September 30, 1975. When a Wallace's sales slip turned up in an abandoned, stolen car a few days later, Tr. 144,* an FBI agent, Billy C. Bartlett, came to the store and, on October 3, 1975, Mrs. Gonzalez gave him a general description of two men she had served, Tr. 122-25, 144. Two months later, on December 1, 1975, Agent Bartlett returned to Mrs. Gonzalez with a spread of nine photographs. Tr. 144-48. Of these, only two photos were the same size as that of the appellant. Tr. 150. (Three were much smaller prints; two others were double "mug" shots, which the appellant's photo was not; yet another was another different size. Tr. 138, 150.) The witness' description of the man she saw in the store who supposedly was the appellant included his wearing eyeglasses. Tr. 127. Yet despite two months to assemble a fair spread, only appellant's photograph, of the nine displayed, showed a man wearing eyeglasses. Tr. 150. When Mrs. Gonzalez picked the photograph, the agent told her or showed her the subject's name and said she might be called as a witness in his trial. Tr. 151-52, 164-65. She ultimately did receive a subpoena with the appellant's name on it and was told he

*There was no evidence tying this car to appellant or to the Danbury escape.

was on trial. Tr. 164-65. At the trial, she could hardly fail to identify him. This was not a case in which the identification was clearly correct; indeed, its true value and trustworthiness were extremely dubious. The Court should have taken action to ensure its proper treatment by the jury.

B. The Refusal To Give Any Instructions, Despite Written Requests to Charge, Was an Abuse of Discretion.

Because of the considerations in this case outlined above, the appellant submitted two written requests to charge. App. 37-38 Defendant's request number 6 was taken verbatim from the charge given on this subject by United States District Judge Jon O. Newman in United States v. Jenkins, aff'd, 496 F.2d 57 (2d Cir. 1974), of which the essence was:

> All eyewitness testimony, whether the witness is identifying a defendant or a photograph, should be scrutinized with care and caution. . . . Eyewitness testimony is often unreliable. When a witness identifies a photograph before he identifies the person in the flesh, an added risk is injected. . . . [T]he witness may retain in his mind's eye the image from the photograph rather than the image of the person that he saw committing the crime.

This instruction was refused. App. 10; Tr. 201. Similarly, the Court refused defendant's request number 7, id., of which the essence was:

> [T]he use of photographs may sometimes cause witnesses to err in identifying criminals. . . . This danger will be increased if the police . . . show [a witness] the pictures of several people among which the photograph of a single such individual . . . is in some way emphasized.

This latter request was taken directly from Simmons v. United States, 390 U.S. 377, 383 (1968). In United States v. Fernandez, 456 F.2d 638, 643-44 (2d Cir. 1972), Judge Friendly said that this specific instruction "should be given if requested." The same admonition was repeated in United States v. Evans, 484 F.2d 1178, 1188 (2d Cir. 1973), and very recently in United States v. Gentile, 530 F.2d 461, 469 (2d Cir. 1976). Those cases hold that failure to give the instruction is not "plain error," Gentile, supra, and may be harmless under the circumstances, Evans, supra. In this case the refusal was an abuse of discretion and constituted reversible error.

In Gentile, as in this case, there was no objection after the charge to the judge's omission, but there the similarity ends. The trial judge in Gentile told counsel he would give a Simmons-Fernandez charge, but then did not. A reminder from counsel would have cured the error. Here the Court expressly refused the request, adding "[E]ach lawyer has an exception for the failure of myself to charge as requested in your written instructions." /App. 11; Tr. 202. Moreover, the witness' identification in Gentile was admittedly uncertain and equivocal, 530 F.2d

at 467-68, 469, while Mrs. Gonzalez said she was certain of hers. Finally, the function of the disputed testimony in the two trials was totally different. In Gentile, the witness was used only to show that one member of a complex securities conspiracy had committed a particular overt act; here, it was the only independent, disinterested testimony offered by the government to resolve the central credibility issue, about coercion, between two convicts. Since the identification testimony was crucial and a request was made, the instruction should have been given.

A comparison of this case with Evans is likewise illuminating. Evans was convicted of bank robbery, based on the testimony of three eyewitnesses and an FBI handwriting expert. This Court affirmed, but Evans' innocence was subsequently ascertained and admitted by the United States, after Evans had served more than two and a half years of an eight-year sentence. See Brathwaite v. Manson, 527 F.2d 363, 369 n. 11 (2d Cir. 1975), cert. granted, 96 S.Ct. 1737 (1976). In Evans, too, the trial judge refused the cautionary instruction requested here. The affirmance was based in large part on the trial court s "clear and thorough" charge on "the general issue of credibility." 484 F.2d at 1188 & n. 11. Judge Murphy's charge here on credibility mentioned nothing relevant to the testimony of an eyewitness who has seen a suggestive photo display, other than the general query: "Was his or her

recollection as good as they said it was?" /App. 24; Tr. 236. Surely this was not enough in this case. While hindsight shows with bitter clarity that the Evans standard will not always ensure success in the search for truth at trial, the verdict in this case cannot survive even under that test.

Several circuits have adopted supervisory rules requiring a Simmons-Fernandez instruction whenever requested in an appropriate case. See, e.g., United States v. Holley, 502 F.2d 273 (4th Cir. 1974) (setting forth model instruction); United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); United States v. Barber, 442 F.2d 517 (3d Cir. 1971). See also Grano, "Kirby," "Biggers" and "Ash", 72 Mich. L. Rev. 717, 794-98 (1974) (instructions proposed as alternative to exclusionary rule). Judge (now Justice) Stevens wrote not long ago:

> The risk of unfairness [in identification testimony] stems from the danger that juries may attach more weight to the evidence than it actually warrants. That danger can be minimized by appropriate cautionary instructions.34/ [n. 34:] Trial judges should, of course, give such instructions in appropriate cases; moreover, . . . a general rule requiring such instructions may well be desirable . . . .

United States ex rel. Kirby v. Sturges, 510 F.2d 397, 408 & n. 34 (7th Cir.), cert. denied, 95 S.Ct. 2424 (1975). Not surprisingly, the Seventh Circuit, too, has also recently adopted a blanket, supervisory requirement. United States v. Hodges, 515 F.2d 650 (7th Cir. 1975).

This Court may not wish to adopt such a general rule itself. Or it may conclude that words of guidance as in Fernandez and Evans are insufficient to protect the innocent from erroneous conviction. In either event, it cannot be said that the jury in this case would have believed Frey's denial of using coercion over the appellant's contrary and exculpatory version without the disinterested testimony of Mrs. Gonzalez concerning her observations of the man she said was the appellant. The error in refusing the requested instruction was accordingly not harmless. Rather, it constituted an abuse of discretion requiring reversal of this conviction.

II. THE COURT GAVE INSUFFICIENT INSTRUCTIONS ON THE COERCION DEFENSE TO ESCAPE AND ITS RELATIONSHIP TO THE GOVERNMENT'S "FAILURE TO RETURN" THEORY OF THE CRIME.

The appellant claimed that he was compelled at knife-point to leave Danbury Federal Correctional Institution by two prisoners whose escape plans he had refused to join and on whom he was informing. Four days later, he said, after a cross-country odyssey, he managed to elude his remaining captor and turn himself in. The Court charged that coercion was a defense to escape, as appellant had requested, but did not relate that charge to the government's alternative theory of the crime, that is, the "failure to return" analysis. This failure in the charge impaired the appellant's right to have the jury consider his defense.

The government requested and the trial Court granted a charge excerpted from United States v. Chapman, 455 F.2d 746, 749-50 (5th Cir. 1972):

> Now, even if you should find that the defendant White was initially forced by other prisoners to leave Federal custody, if he thereafter on his own volition decided to remain at large, this would constitute the crime of escape. . . .
>
> In summary, an escape occurs when an individual voluntarily leaves his custody or when an individual fails to return to his custody when he has an opportunity.

App. 16-17; Tr. 228-29. Many minutes later in the charge, after discussing in detail such matters as the contents of appellant's original judgment and commitment papers, the

Court gave the coercion charge. App. 23; Tr. 235.

The "failure to return" theory of escape is commonly employed in cases where prisoners "walk away" from furloughs, only to be apprehended involuntarily much later. See, e.g., United States v. Joiner, 496 F.2d 1314 (5th Cir.), cert. denied, 419 U.S. 1002 (1974); United States v. Woodring, 464 F.2d 1248 (10th Cir. 1972); United States v. Hollen, 393 F.2d 479 (4th Cir. 1968). Likewise, the coercion defense has been rejected where the evidence showed a manner of later apprehension consistent only with an intent to avoid confinement. See United States v. Greene, 489 F.2d 1145, 1159 (D.C. Cir. 1973), cert. denied, 419 U.S. 977 (1974); Chapman, supra (defendant was using false identification when arrested); cf. cases where the appellant was too drunk when he left the prison to have an intent to leave: compare United States v. Nix, 501 F.2d 516 (7th Cir. 1974), with Chandler v. United States, 378 F.2d 906 (9th Cir. 1967). In none of those cases did the court face the situation here, that of a plausible coercion defense presented by one who openly and freely revealed his identity and "escape" status to a local policeman only a few hours and one hitch-hiked ride after eluding the prisoner he said forced him to accompany him.

This unusual fact pattern required the trial judge to give a more careful and integrated instruction. One such

standard has been developed by the California Court of Appeals after an exhaustive review of the case law:

> From all of the above, we hold that the proper rule is that a limited defense of necessity is available if the following conditions exist:
>
> (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
>
> (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
>
> (3) There is no time or opportunity to resort to the courts;
>
> (4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and
>
> (5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

People v. Lovercamp, 43 Cal.App.3d 823, 831-32, 118 Cal. Rptr. 110, 115 (1974) (footnote omitted). See also Matthews v. Mississippi, 288 So.2d 712 (1974); People v. Harmon, 220 N.W.2d 212 (Mich.App. 1974). Under such an instruction, the jury could have decided when the appellant had "attained a position of safety" from which he was obligated to return. They might reasonably have concluded that this safe place would not be in Denver, where, appellant testified, Frey held him at the point of a shotgun. Tr. 78-80. Under the vague and inadequate instructions given, the jury might have believed the appellant's testimony and still convicted.

The error was accordingly not harmless and the judgment should be reversed.

III. THE COURT IMPROPERLY SHOWED HIS DISBELIEF OF THE APPELLANT'S TESTIMONY AND INCORRECTLY SUGGESTED THAT THE DEFENDANT, ALONE AMONG THE WITNESSES, HAD AN INTEREST IN TESTIFYING.

The credibility of the coercion defense to this escape charge depended chiefly on the appellant's testimony in his own behalf. The evidence before the jury was that Frey, clearly the instigator of the escape, had a violent prior record and had committed a previous escape; the appellant had neither. Tr. 180-83. Frey and Carroll had years remaining on their terms, the appellant only 90 days. Tr. 82-83, 183-84, 195-96. Frey carried and used weapons, while the appellant did not. E.g., Tr. 73, 79, 103, 187-88. Frey and Carroll drove the stolen vehicle or vehicles; the appellant does not even know how to drive. Tr. 76, 186-87. The group travelled to places where Frey and Carroll, but not the appellant, had relatives and friends and knew their way around. Tr. 96-97, 99-100, 177. With a proper charge, and especially if there also had been the identification charge requested with respect to the Gonzalez testimony (see Point I above), the jury might have considered all this corroboration and credited the appellant's version over Frey's. But improper comments by the trial judge undercut this possibility. These comments together amounted to reversible error.

During the direct examination of the appellant by counsel, the trial judge interrupted and asked a grossly prejudicial

question which could only have communicated to the jury the Court's disbelief of the appellant's testimony. The appellant was telling how, after his arrival as a hitchhiker in Frisco, Colorado, the day he finally got away from Frey, he walked over to the first policeman he saw, told him his name and said he was an escaped federal prisoner. After asking two clarifying questions, the trial judge asked:

> Did you tell your lawyer this before?
> The Witness [Mr. White]: Yes, sir. I have.
> The Court: Really? . . . .

App. 8; Tr. 82. No similar incident occurred with any other witness. The judge here assumed the role of prosecutor. The Court's opinion on the defendant's credibility could not have been made more clear.

This negative opinion of the appellant was communicated again during the charge. The Court included in the charge on credibility a passage based on Reagan v. United States, 157 U.S. 301, 304-11 (1895), to the effect that the defendant in a criminal case has a special motive for giving false testimony. App. 24-25; Tr. 236-37. Counsel excepted without result. App. 29; Tr. 241. A Reagan charge is not necessarily prejudicial if given in a fair context. United States v. Dozier, 522 F.2d 224, 227 (2d Cir. 1975). But it is generally agreed that a more general instruction on the effect of the interest of a witness on his or her credibility is preferable. See

United States v. Hill, 470 F.2d 361, 363-65 (D.C. Cir. 1972) (MacKinnon, J.), citing 1 Devitt & Blackmar, Federal Jury Practice and Instructions § 12.11, at 264 (1970). As Judge (now Justice) Blackmun put it:

> We would prefer that the defendant not be singled out. His interest is obvious to the jury. A general reference, such as 'including the defendant,' should suffice.

Taylor v. United States, 390 F.2d 278, 285 (8th Cir. 1968). Here the Court made no reference to the interest of any witness other than the defendant-appellant.

This circuit has been careful to evaluate the setting of a Reagan charge to determine whether it was prejudicial. In United States v. Mahler, 363 F.2d 673, 678 (2d Cir. 1966), for example, the Court relied upon several factors not present here to sustain the charge. In Mahler, unlike this case, the Court instructed that "the key government witness also had an interest" and that his testimony, too, "had to be 'weighed with a great deal of care.'" Id. Although Kent Frey (and James Carroll) might have faced federal charges of kidnapping and assault if they corroborated the appellant's testimony, offenses carrying a penalty of life in prison, the trial judge did not mention that interest in any way in the charge. Nor did counsel for Mahler object to the charge there; here, an exception was taken and overruled. App. 29; Tr. 241.

In the context of the other points outlined above, the charge was prejudicial and the trial judge's conduct overall was unfair. The conviction should be reversed.

CONCLUSION

The only disinterested witness to testify in rebuttal of the appellant's coercion defense based her testimony on an eyewitness identification reinforced by a prior photographic display, but the trial Court refused to give a requested instruction on evaluation of identification evidence. In addition, the charge on the interaction between the theory of the defense and the government's theory of the case was grossly inadequate. Finally, the trial judge displayed his disbelief of the appellant before the jury and gave a charge incorrectly suggesting that only the defendant had an interest in testifying sufficient to motivate a falsehood.

For each of these reasons and for all of them together, the conviction should be reversed and remanded for a new trial.

Respectfully submitted,

Andrew B. Bowman
Chief Federal Public Defender

Date: September 23, 1976

CERTIFICATE OF SERVICE

This is to certify that two copies of the Appellant's Brief and Appendix were mailed to Hugh W. Cuthbertson, Assistant United States Attorney, 270 Orange Street, Post Office Box 1824, New Haven, Connecticut 06508, this 23rd day of September, 1976.

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